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Paul J. Bauer

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The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights, or an Impediment to True Reforms?

Paul J. Bauer*

I. INTRODUCTION

Seafarers, the laborers who work on freight ships engaged in domestic and international trade, compose a vital part of the global economy. Around 80 percent of world trade involves ocean shipping, and, as a result, the health of foreign commerce is inextricably linked to the work done by seafarers.¹

Labor conditions for seafarers are often suboptimal. These poor working conditions result from the temporary nature of their work and the unfavorable bodies of law that seafarers may be subjected to dependent upon the flag under which they sail. The Maritime Labour Convention ("Convention"), which was adopted by the International Labour Organization ("ILO") on February 23, 2006, aims to improve labor conditions for seafarers around the world by establishing standard rights for all seafarers.² While Member Nations of the ILO determine whether or not to ratify the Convention, it is important for them to consider whether this agreement will deliver on its promise to provide seafarers with the improved rights and conditions they have long requested.

This Development aims to review the various difficulties particular to the seafaring profession and to consider whether the proposed Convention will successfully address these concerns. The Development outlines the framework

* BA 2002, Boston University; JD Candidate 2008, The University of Chicago. I would like to thank Professor Eric Posner and the staff of CJIL for their editing assistance and helpful input. I would also like to thank my family for their constant support, and my fiancée, Pilara Felgate, for her love and encouragement.

¹ See UN World Summit on Sustainable Development, *Press Conference on 'Flags of Convenience'*, available online at <<http://www.un.org/events/wssd/pressconf/020830conf9.htm>> (visited Nov 17, 2007) ("Some 80 percent of the world's trade involved shipping.").

² Maritime Labour Convention (July 2, 2006), available online at <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C186>> (visited Nov 17, 2007).

of the Convention, discusses the Convention's inadequacies, and makes suggestions for improvement.

While the Convention represents a serious advance over the current amalgamation of international laws regarding seafarer rights, it provides only a modest benefit to seafarers because its mandates are incomplete, largely discretionary, and potentially unenforceable. Ratification of the Convention is likely to discourage any further developments in seafarers' rights for the foreseeable future, so any problems that are not addressed now, such as availability of visas for shore leave and protection of the right to strike, are likely to remain significant problems for future generations.

II. THE PROBLEMS FACED BY SEAFARERS

The unique employment circumstances that seafarers face, such as the temporary nature of each job and the difficulties inherent in working at sea for an extended period of time, necessitate a specialized set of labor regulations to ensure that these workers are treated fairly under the law. Labor laws that dictate employment relationships on land are not perfectly applicable to the seafaring industry, as seafarers on ships do not enjoy the same immediate resources (such as hospitals and lawyers) and recourses (namely, the courts and mediators) as do their land-dwelling counterparts.

A primary concern for seafarers is their own health and well-being. Because workers are generally isolated on their ships or are spending brief periods of time in foreign ports around the world, it is essential that their health and any necessary medical care be provided for by the shipowners for whom they work.³ In addition, since they are isolated on the ship, which, in essence, is their office, it is crucial that strict maximum hour laws be imposed and mandatory rest periods be provided.

Another concern shared by seafarers and shipowners alike is the declining effectiveness of onboard training.⁴ Because of reductions in the number of crew members per ship, faster turnarounds on shipping jobs, more frequent crew changes, and multinational crews with divergent language and cultural

³ See Deirdre Fitzpatrick and Michael Anderson, eds, *Seafarers' Rights* 32 (Table 1.3) (Oxford 2005) (stating that "[s]eafaring remains the most dangerous of occupations as a percentage of those employed," and indicating average annual mortalities for seafarers of 1,102 from maritime disasters, 419 from occupational accidents, 521 from illness, and 74 missing at sea). Compare these numbers to the approximately 1.2 million seafarers who work in the trade worldwide.

⁴ See Efthimios Mitropoulos, *Pressing Safety Issues and the Work of the International Maritime Organization (IMO)*, in Myron H. Nordquist and John Norton Moore, eds, *Current Maritime Issues and the International Maritime Organization* 45, 46 (Martinus Nijhoff 1999).

backgrounds, such training has become considerably more difficult.⁵ This negatively impacts seafarers because they are unprepared to accomplish the tasks expected of them and may be more likely to suffer injury as a result. It also adversely impacts shipowners because untrained crews are less capable of skillfully and efficiently performing required tasks.

The greatest difficulty faced by seafarers is the fact that their legal rights are often hard to discern, as are the jurisdictions in which these rights can be enforced. As one commentator has stated:

It is not unusual for a seafarer to work on a vessel registered in a foreign country, sailing on the high seas and calling at ports in countries other than that of her flag, owned by citizens of yet other countries, insured in other countries, perhaps chartered by interests in other countries, managed by a company in another country, and carrying cargo owned by citizens of other countries.⁶

To further complicate matters, most seafarers are hired through recruiting agencies which may or may not be located in the seafarer's home country, which potentially introduces another nation's laws into the fray.⁷ Under such convoluted circumstances, it is a daunting task for a seafarer to understand his rights, let alone ensure that they are upheld. This difficulty is further compounded because international seafarer rights are currently spread throughout dozens of related but distinct agreements, all of which may or may not have been ratified by the relevant country or countries.⁸

While not the sole source of the problems faced by seafarers, the primary basis for many of these difficulties is the "flag of convenience" ("FOC") system. Under this system, nations permit shipowners from other nations to sail under their flags for a fee. This is of great significance because the flag under which a ship sails often determines which nation's laws apply to that ship in any

⁵ See *id.*

⁶ Douglas B. Stevenson, *Book Review*, 36 J Marit L & Comm 567, 567 (2005) (reviewing Fitzpatrick and Anderson, eds, *Seafarers' Rights* (cited in note 3)).

⁷ Fitzpatrick and Anderson, eds, *Seafarers' Rights* at 29 (cited in note 3).

⁸ See International Labour Organization, *Preparatory Technical Maritime Conference: ILO Moves to Consolidate New Labour Standard for the Maritime Industry*, (Sept 13, 2004), available online at <http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_005221/index.htm> (visited Nov 17, 2007) ("Delegates to the Conference will work to combine elements of all relevant standards approved in the framework of the ILO, including 30 Conventions, 29 Recommendations and 1 Protocol."). In addition, note that not all of the relevant conventions are ratified by all of the states involved with the Maritime Labour Convention; for example, compare the Right to Organise and Collective Bargain Convention (1949), C 87, available online at <<http://www2.ohchr.org/english/law/organise.htm>> (visited Nov 17, 2007) (ratified by 156 countries) with the Forced Labour Convention (1930), C 29, available online at <<http://www.unhchr.ch/html/menu3/b/31.htm>> (visited Nov 17, 2007) (ratified by 170 countries).

admiralty cases that arise.⁹ Shipowners take advantage of this system for various reasons, including tax benefits, simplified ship registration, increased access to areas of the world, and, of greatest concern, lax legal standards.¹⁰ As Jon Whitlow, the Seafarers' Section Secretary for the International Transport Workers' Federation, explained:

The crisis [in the seafaring industry] is manifested in the projected shortage of suitably skilled and qualified seafarers, the growing age of the world fleet, the large number of lives lost at sea, the lack of flag State implementation and the spiraling increase in the number of port State control detentions. . . . [T]he principal cause of the crisis is unfair competition and the competitive distortion caused by the existence of the [FOC] system.¹¹

For this reason, a workable solution to the FOC problem must be central to any comprehensive international maritime law if it is to achieve success in resolving the difficulties inherent in the modern shipping industry.

III. THE MARITIME LABOUR CONVENTION

On February 23, 2006, the ILO, an agency of the United Nations that promotes internationally recognized human and labor rights, adopted the Maritime Labour Convention in hopes of establishing standard rights for all seafarers. This agreement modernizes, condenses, and combines all of the previous sixty-eight agreements regarding seafarer rights while also adding new provisions to ensure that seafarers will receive optimal working conditions and benefits.

There are five primary Titles in the Convention, each of which serves a distinct purpose. Each Title is composed of regulations, standards (Part A), and guidelines (Part B). The regulations and standards are mandatory, while the guidelines are more particularized suggestions for implementation that may or may not be followed at the signing party's discretion.¹²

The first Title, *Minimum Requirements for Seafarers to Work on a Ship*,¹³ establishes a minimum age of sixteen for seafarers, mandates recruitment and training procedures, and requires each seafarer to produce a medical certificate verifying his good health before he is employed. The second Title, *Conditions of*

⁹ See *Lauritzen v Larsen*, 345 US 571, 585–86 (1953) (affirming that the law of the flag governs all matters onboard a ship that affect only the ship).

¹⁰ See Shayna Frawley, *The Great Compromise: Labour Unions, Flags of Convenience and the Rights of Seafarers*, 19 Windsor Rev Legal & Soc Issues 85, 88–91 (2005).

¹¹ Jon Whitlow, *Maritime Concerns of the International Transport Workers' Federation*, in Nordquist and Moore, eds, *Current Maritime Issues* 177, 178–79 (cited in note 4).

¹² Maritime Labour Convention, *Explanatory Note to the Regulations and Code of the Maritime Labour Convention* at ¶¶ 5–6 (cited in note 2).

¹³ *Id.* at Title 1.

Employment,¹⁴ requires all seafarers to enter into a written employment agreement with the shipowner, calls for payment on at least a monthly basis, establishes that the standard work day will be eight hours and overtime pay must be at least 25 percent greater than the standard rate, and mandates rights to both shore leave and repatriation. The third Title, *Accommodation, Recreational Facilities, Food and Catering*,¹⁵ establishes specific standards for the size and furnishings of living quarters, and mandates that all religious and cultural food requirements be respected and accommodated by the shipowner. The fourth Title, *Health Protection, Medical Care, Welfare and Social Security Protection*,¹⁶ requires that onboard medical care be given to seafarers in need at the shipowner's cost, ensures that sick or injured seafarers will be paid as long as they remain on board the ship, and provides for occupational safety standards. The fifth and final Title, *Compliance and Enforcement*,¹⁷ requires that ships carry a maritime labor certificate which certifies compliance, provides that each individual nation will be responsible for enforcing these provisions over all ships that sail under their flag, grants certain protections to whistleblowers, and allows member nations to perform inspections of ships from other member nations that enter their ports to ensure compliance.

Compliance with the Convention's regulations and standards will be policed via two primary avenues. First, Article XIII establishes a committee that will oversee compliance and continually review the Convention for amendment.¹⁸ This committee will consist of representatives from each ratifying nation, as well as seafarer and shipowner representatives, to ensure that all interests are protected.¹⁹ Second, Article V provides for in-port ship inspections by ratifying nations and declares that member nations will be forbidden from favoring ships that fly the flag of nonratifying states.²⁰

While these Titles and compliance provisions appear to establish sweeping rights for seafarers, the success of this Convention is far from guaranteed. Even if the requisite number of states do ratify the current draft and put it into force, key omissions, loopholes, and a lack of enforcement could turn the Convention into little more than an empty promise.

¹⁴ Id at Title 2.

¹⁵ Id at Title 3.

¹⁶ Id at Title 4.

¹⁷ Id at Title 5.

¹⁸ Id, art XIII.

¹⁹ Id, art XIII(2).

²⁰ Id, art V(4), (7).

A. PROSPECTS FOR RATIFICATION

The Convention will not enter into force until twelve months after it has been ratified by at least thirty states, representing at least one-third of the total gross tonnage of the world's ships.²¹ Thus far, only Liberia and the Marshall Islands have ratified the agreement.²² It appears likely, however, that a sufficient number of countries will eventually ratify the Convention for it to come into effect. The drafted language was voted on by ILO members, and was approved by a vote of 314–0, with 4 abstentions.²³ As stated by an ILO press release, “[c]are has been taken through a blend of firmness and flexibility to make [the Convention’s] provisions acceptable to all countries with an interest in the maritime sector.”²⁴ Further, the vast majority of the language simply consolidates provisions from previous agreements, so it is unlikely that anything in the Convention will directly contradict the laws of a majority of Member States. There may be minor differences that need to be rectified, such as discrepancies in the minimum age of seafarers, but nothing so fundamental as to challenge ratification.²⁵

B. ENFORCEABILITY

Whenever a large international agreement is undertaken, enforcement is inevitably a concern. Compliance with the Maritime Labour Convention is to be achieved primarily through Article XIII, which establishes an international representative committee to oversee compliance, and Article V, which provides for in-port inspections of ships by ratifying nations.

According to Article XIII of the Convention, “the International Labour Office shall keep the working of this Convention under continuous review through a committee established by it with special competence in the area of

²¹ Id, art VIII(3).

²² See John Zarocostas, *Liberia is First Nation to Sign ILO Maritime Convention*, Lloyd’s List Intl 5 (June 9, 2006).

²³ See International Labour Conference, 17 Provisional Rec 1, 14–17 (2006), available online at <<http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-17.pdf>> (visited Nov 17, 2007) (indicating how each delegate voted, including the four abstentions which were cast by the delegates from Venezuela and Lebanon). See also id at 1, 2 (explaining that Venezuela and Lebanon abstained for reasons that were not directly related to the contents of the Convention).

²⁴ See International Labour Organization, *ILO Adopts Sweeping New Charter for Maritime Sector*, (Feb 23, 2006), available online at <http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_068477/index.htm> (visited Nov 17, 2007).

²⁵ See Fitzpatrick and Anderson, eds, *Seafarers’ Rights* at 313, 342, 466 (cited in note 3) (stating that the minimum age for seafarers is fifteen in Greece, Liberia, and South Africa).

maritime labour standards.”²⁶ While this committee will review the Convention’s operation and effect, it is unlikely to play any significant role in ensuring that the provisions of the Convention are enforced against noncompliant countries. It is unclear whether this committee is endowed with any authority to report or to penalize a member nation that has violated provisions of the Convention, as no such authority is expressly granted. The committee will not likely have any real power to enforce the provisions of the Convention because the ILO generally lacks enforcement power over the labor rights it establishes.²⁷ Often, the standards put forward by the ILO are referred to as “soft international law” because they “fail to lay down specific, directly enforceable legal obligations, but rather limit themselves to setting forth standards of conduct deemed desirable by the respective international organizations and their member states.”²⁸ In practice, this committee will do little more than consider amendments to the Convention and debate proposed changes. That being said, the ILO’s inability to enforce its own Convention does not necessarily condemn its provisions to futility. If the ratifying states remain committed to the Convention, its provisions may be upheld through a system of self-enforcement by the member states.

Given that adherence to the Convention is to be policed by the member nations themselves, there is real concern that these nations will act in their own self-interests and ignore violations by native shippers so as to increase business within their own shipping industries. The provision in Article V allowing for in-port inspections of ships by member nations responds to this concern. The hope is that the importing nations will inspect ships that enter their ports to ensure compliance with all duties under the Convention, and will cease dealings with any nation whose ships are not in compliance. As was recognized by G.E. Kurz, the President of Mobil Shipping and Transportation Co., for any global regulations to work in the international shipping industry,

[t]ough, well-aimed port State inspections are critical, but so is the role of flag States. They have to show greater vigilance in assuring compliance with the conventions to which they are parties and resist the temptation to overlook deficiencies for the purpose of attracting and retaining vessels under their registry.²⁹

Indeed, compliance must be required both by port states and flag states to ensure that a collective action problem does not arise. Flag states must require that all shipowners sailing under their colors obey all of the Convention’s

²⁶ Maritime Labour Convention, art XIII(1) (cited in note 2).

²⁷ See Marjorie Cohn, *The World Trade Organization: Elevating Property Interests above Human Rights*, 29 Ga J Int'l & Comp L 427, 434 (2001).

²⁸ Hans W. Baade, *The Operation of Foreign Public Law*, 30 Tex Int'l L J 429, 446 (1995).

²⁹ G.E. Kurz, *Implementing IMO Regulations and Oceans Policy*, in Nordquist and Moore, eds, *Current Maritime Issues* 353, 357 (cited in note 4).

mandates, and they are likely to do so provided that port states inspect incoming vessels in earnest and respond to a lack of compliance by rejecting the goods and refusing future dealings with ships that sail under the offending flag.

The key to enforcement, then, is to ensure that port states take these responsibilities seriously. Economic incentives for port states to conduct these inspections may exist as a direct result of competition within the shipping industry; it is in a nation's self-interest to ensure that none of its fellow shipping states are gaining a competitive advantage by ignoring the Convention's mandates. However, this assumes that the nations involved are in direct competition, which may not be true, as not all nations export the same products. Here, a problem of deleterious symbiotic relationships arises, whereby two nations may eschew the idea of reciprocal fairness and conveniently ignore each other's violations to enjoy the lower shipping costs that result. Such situations may also arise in instances where a pure importing nation, which has no interest in maintaining a ship registry or protecting the welfare of native seafarers, is dealing with a flag state. The importing nation's greatest interest would be a reduced price on imported goods, and the flag state's primary concern would be increasing its registry via the appeal of lax standards. In such an interaction, both nations could achieve their objectives by ignoring the Convention's mandates, and there are no provisions within the four corners of the Convention that would prevent them from doing so.

To combat this problem of enforcement, it may be necessary to have an independent body conduct ship inspections and report the results to all ratifying nations.³⁰ David Cockroft, General Secretary of the International Transport Workers' Federation ("ITF"), has indicated that his organization may serve this role by having ITF inspectors work alongside state port inspectors to ensure that all laws are complied with and all seafarers are informed of their rights.³¹ If ITF inspectors are not utilized, the ILO member states would need to work out the logistics of creating and funding an independent body to conduct inspections. Such a system would be a legitimate method of ensuring compliance or, at minimum, ensuring that member nations are informed of noncompliance when it occurs. In any event, this analysis demonstrates the difficulties of ensuring compliance and serves to warn that reliance upon flag state enforcement and in-port inspections by ratifying states may not be sufficient.

³⁰ See Robert E. Scott and Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 Wis L Rev 551, 624 (2004) (discussing the balance between self-enforcement and third-party coercion within the context of international agreements).

³¹ Miren Gutierrez, *Q&A: Shipping Still at Sea*, Inter Press Service (Sept 3, 2007) (interview with David Cockroft), available online at <<http://www.ipsnews.net/news.asp?idnews=39123>> (visited Nov 17, 2007).

C. FLAGS OF CONVENIENCE AND FOC NATIONS

Under current shipping laws, one of the greatest threats to seafarer rights is ships that sail under flags of convenience. This term is used to describe ships that choose to sail under the flag of a nation with notoriously lenient registration requirements and weak labor standards. As a result of these lax labor protections, the shipowners are able to save significant money by providing substandard conditions and benefits to their workers and can attract business by passing on some of these savings to shippers.³² These cost-cutting techniques endanger seafaring crews and put ships that follow more stringent labor laws at a distinct competitive disadvantage. Ships that sail under these flags of convenience pose significant concerns related to enforceability of the Convention, but ultimately the Convention appears equipped to deal with such concerns.

If these FOC nations choose not to ratify the Convention, they could gain an even greater stranglehold on the shipping market as the costs of shipowners sailing under non-FOC flags will increase (due to the new requirements they will have to meet) and costs for FOC shipowners, which are already substantially lower, will remain static. If this were to occur, the vast majority of seafarers would be working on FOC ships, which are already known to have paltry labor standards, outside of the Convention's reach.

For two primary reasons, however, this is unlikely to pose a significant problem. First, there is no indication that FOC nations will refuse to ratify the Convention. The first nation to ratify the Convention, Liberia, is one of the most prominent FOC nations in the industry,³³ and of the only two nations that abstained from the vote approving the Convention—Venezuela and Lebanon—only Lebanon is considered an FOC nation.³⁴ Further, Lebanon explicitly stated that it abstained solely because of national economic concerns and that it hopes to adhere to the Convention when its financial situation improves.³⁵ Second, even if FOC nations do refuse ratification, the Convention's provisions can still

³² See Frawley, 19 Windsor Rev Legal & Soc Issues at 90–91 (cited in note 10); International Transport Workers' Federation, *FOC Countries*, available online at <<http://www.itfglobal.org/flags-convenience/flags-convenience-183.cfm>> (visited Nov 17, 2007) (listing countries that have been declared FOC nations by the International Transport Workers' Federation Fair Practices Committee).

³³ See Sean D. Murphy, ed, *Contemporary Practice of the United States Relating to International Law*, 98 Am J Intl L 349, 355 n 6 (2004); Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 Harv Intl L J 131, 142 n 65 (2005).

³⁴ See J. Michael Taylor, *Evaluating the Continuing GATS Negotiations Concerning International Maritime Transport Services*, 27 Tulane Marit L J 129, 151 n 120 (2002) (listing flag of convenience, or open registry, nations).

³⁵ International Labour Conference, 17 Provisional Rec at 2 (cited in note 23).

be enforced against them. According to the ILO, Article V of the Maritime Labour Convention provides that “ships of all countries (irrespective of ratification) will be subject to inspection in any country that has ratified the Convention.”³⁶ This may reduce concerns about both ratifying and nonratifying nations shirking the Convention’s mandates and serving as flags of convenience, so long as the member nations take this inspection process seriously.

D. ARTICLE II: A CURIOUS PROVISION THAT TOUCHES UPON
DOMESTIC SHIPPING, AND POTENTIALLY
JEOPARDIZES EFFECTIVENESS

A bizarre provision in Article II of the Convention may undermine its effectiveness by allowing member nations to skirt its provisions.

Article II states that where it would not be “reasonable or practicable” for a provision of the Convention to be applied to a ship of less than 200 gross tonnage that is “not engaged in international voyages,” a member nation need not apply that provision to that ship.³⁷ These determinations of reasonability and practicality are to be made in consultation with the shipowners and seafarers associations within that nation.³⁸ There is no guidance given as to what may be considered unreasonable or impractical, and there is no international arbiter of such decisions. In essence, this provision gives any domestic trade ship of less than 200 gross tonnage a pass to be exempted from any or all of the provisions of the Convention without recourse.

It first must be noted that this provision is not a concern for international trade, as ships that sail along international routes do not fall under this exemption. It is unclear why an international treaty need regulate domestic activity at all. It has been argued in the past that international treaties should not regulate matters of purely domestic concern.³⁹ US courts have responded to this argument, indicating that an international agreement need not deal exclusively with international matters, provided that it touches upon “the treatment of foreign nationals while they are on local soil” or “a matter of grave concern to the international community.”⁴⁰ It is at least arguable, though not clearly the case, that the Convention meets both of these tests in that domestic shipping

³⁶ International Labour Organization, *Frequently Asked Questions*, ¶ 15, available online at <http://www.ilo.org/global/What_we_do/InternationalLabourStandards/MaritimeLabourConvention/FAQs/lang--en/index.htm> (visited Nov 17, 2007).

³⁷ Maritime Labour Convention, art II(6) (cited in note 2).

³⁸ See *id.*

³⁹ See *US v Lue*, 134 F 3d 79, 83 (2d Cir 1998).

⁴⁰ *Id.*

could involve foreign seafarers, and the welfare of seafarers has proven to be of concern to the international community, as evidenced by creation of the Convention itself. In any event, the application of this international Convention to domestic shipping is, at the very least, questionable.

Putting aside the question of domestic application of an international agreement, this provision may create significant concern in the domestic realm because ships involved in domestic trade are generally smaller than foreign waterborne fleets.⁴¹ While the overall size of ships in international trade is trending upwards to increase economic efficiency,⁴² such a movement may not be as worthwhile in the domestic sphere, given that shorter, more manageable voyages are typical. If this holds true, shipowners may resort to the use of smaller ships specifically to avoid the mandates of the Convention, thereby leaving domestic seafarers without the intended legal protections.

IV. CONCERNS THAT MAY NOT BE ADEQUATELY ADDRESSED BY THE CONVENTION

In addition to the loophole for small domestic ships that appears in the Convention's text, there are several other concerns regarding the rights of seafarers that are not expressly addressed by the Maritime Labour Convention at all. Questions remain as to whether the Convention has successfully addressed these matters through its various provisions, and, if not, whether a failure to directly address them will prevent the Convention from having its intended effect. To ensure that the agreement is successful in creating meaningful rights for international seafarers, the ILO might consider revising the language to deal directly with the crucial matters discussed below.

A. AVAILABILITY OF VISAS FOR SHORE LEAVE

The second Title of the Convention, *Conditions of Employment*, requires that seafarers be granted shore leave for their own health and well-being.⁴³ While this is certainly a step in the right direction, the Convention fails to recognize that the availability of shore leave is sometimes dependent on more than the shipowner's discretion. Shore leave is crucial to the health and well-being of seafarers, and the Convention should make a more concerted effort to ensure that it is provided for, not just by the shipowners, but by the port countries as well.

⁴¹ See, for example, US Census Bureau, *Statistical Abstract of the United States: 2003*, Table 1072 (123d ed 2003) (detailing the tonnage of the US fleet in foreign and domestic waterborne trade).

⁴² *Maxing Out; Container Ships*, Economist 74 (Mar 3, 2007).

⁴³ Maritime Labour Convention at Reg 2.4(2) (cited in note 2).

Shore leave has been recognized as an essential aspect of the shipping industry, as it directly relates to the health of seafarers and their ability to maintain focus on their tasks:

Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.⁴⁴

The Convention has recognized the importance of shore leave by making it a requirement, but has not ensured that it will be provided. The availability of shore leave is not a problem in every importing nation, as the vast majority of nations do not require a visa for entry into port. Some do, however, and this threatens the ability of shipowners to guarantee shore leave without proper preparation.

With its requirement of D-1 visas, the United States has the most notoriously difficult shore leave standards. In the United States a foreign seafarer must obtain a D-1 visa before he is permitted to leave his ship.⁴⁵ These visas cost \$100 and typically must be obtained by the seafarers themselves.⁴⁶ The Convention, though it mandates shore leave generally, says nothing about informing seafarers of these visas, assisting seafarers in applying for and obtaining these visas, or ensuring that they have these visas before they come on board. In addition, there is no requirement that port nations using visa systems reduce the waiting period or arrange for these visa requirements to be simplified or waived. The Convention does call for on-shore facilities to be provided within the ports of member nations and for shore leave to be facilitated immediately upon a ship's arrival into port, but this language is certainly not strong enough to mandate that visa requirements be waived or modified.⁴⁷

Australia is also set to implement a visa requirement for seafarers on shore leave. The details of this new visa system were released on July 1, 2007, and visas will be mandatory for any seafarer wishing to enter Australia at port starting on

⁴⁴ *Aguilar v Standard Oil Co*, 318 US 724, 733–34 (1943).

⁴⁵ See Seafarers International Union, *Apostleship of the Sea Steps Up to Protect Shore-Leave Rights*, (2004), available online at <<http://www.seafarers.org/log/2004/032004/d1.xml>> (visited Oct 12, 2007).

⁴⁶ See Douglas B. Stevenson, *Restrictions on Shore Leave: Any Movement on this Issue?*, (2005), available online at <<http://www.marinelog.com/DOCS/PRINTMMV/MMVmarstev1.html>> (visited Oct 12, 2007).

⁴⁷ See Maritime Labour Convention, Standard A 4.4, Guideline B 4.4.6 (cited in note 2).

January 1, 2008.⁴⁸ While this new requirement will certainly be burdensome for seafarers, the visas will be free of charge and will be valid for a period of three years.⁴⁹

If the ILO is serious about the Convention's guarantee of shore leave, it must pressure the US and Australia to abandon or to rework these visa requirements. At minimum, the Convention should require that shipowners inform all of their crewmembers about the visa requirements in destination ports and assist these seafarers with the application process. Determining whether the seafarers were given this information and assistance must become a part of the in-port inspection system as well to ensure that these provisions are being obeyed. Without these provisions, seafarers entering the popular ports of the US and Australia will too often be deprived of shore leave, and other nations may begin to establish visa requirements of their own in retaliation.

B. PROTECTION OF SEAFARERS' ABILITY TO STRIKE

While the Convention addresses matters such as the timeliness of payment and the maximum number of hours to be worked by seafarers, it does not explicitly address the seafarers' ability to uphold these rights through lawful strikes. If seafarers are denied the right to strike onboard ship, they will be deprived of their most powerful tool to ensure that the fair conditions guaranteed by the Convention are followed.

The right to strike is well-established for land-based workers, but the nature of shipping raises unique concerns about seafarer strikes. As Justice Byrnes once recounted:

Ever since men have gone to sea, the relationship of master to seamen has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. . . . He must command and the crew must obey.⁵⁰

While this draconian view of a seafarer's duties may not have as much traction today as it once did, it has certainly impacted the decisions of courts and lawmaking bodies in a way that is still observed in modern law. Legal decisions that challenge the seafarers' right to strike have been made by the judicial and legislative branches of several big players in the shipping industry.

For example, in *Teamsters Local 174 v Lucas Flour Co* ("Lucas Flour"), the United States Supreme Court indicated that a labor union which has signed a contract that includes an arbitration agreement can not lawfully institute a

⁴⁸ *Australia to Demand Seafarer Visas*, Lloyd's List Intl 16 (June 29, 2007).

⁴⁹ *Id.*

⁵⁰ *Southern Steamship Co v National Labor Relations Board*, 316 US 31, 38 (1942).

strike.⁵¹ This matter, while of general interest to the labor community at large, is of specific importance to seafarers because of the environment in which they work. Seafarers are isolated on a ship at sea where immediate arbitration may not be a practical recourse when a dispute arises. Therefore, if seafarers enter into an arbitration agreement and there is no arbiter onboard, that agreement will effectively serve as a no-strike agreement whenever a dispute arises on the ship. This could lead to three possible results: (1) seafaring contracts will no longer contain arbitration agreements, (2) arbitration agreements will continue to be used in seafaring contracts, to the detriment of the seafarers, or (3) shipowners that continue to use arbitration agreements in their contracts will need to retain an arbiter on every ship in case a dispute arises. All three of these outcomes are less than favorable. Arbitration agreements are generally useful because they provide an opportunity for both employer and employee to settle disputes before a neutral expert. At the same time, arbitration agreements will prevent seafarers from resolving on-ship disputes legally unless there is an arbiter onboard, and the cost of retaining an onboard arbiter is not favorable to the shipowner.⁵² This trio of less-than-desirable options indicates that this Supreme Court decision leaves the US seafaring industry in a difficult position directly impacting seafarers' ability to enforce rights guaranteed in the Convention.

Other nations that have a significant impact on the seafaring industry also have laws that make it difficult for seafarers to strike. China, which has the largest workforce in the world—and also has one of the largest registers in the international shipping industry—does not recognize a worker's right to strike under the law.⁵³ Liberia, which has used its open ship registry and FOC status to build one of the largest merchant fleets in the world, has severely limited seafarers' right to strike by requiring that the workers on a ship approve such a stoppage by secret ballot and then give at least thirty days advance notice before a strike is commenced.⁵⁴ The United Kingdom, though not currently a heavyweight as far as the number of vessels that sail under its flag, has passed legislation which reduces the tax burden on the shipping industry in an effort to lure shipowners back to its national registry.⁵⁵ Under the legal framework in the United Kingdom, seafarer strikes are prohibited on all UK registered vessels while at sea.⁵⁶ These various methods of limiting or prohibiting seafarers' right to

⁵¹ See *Teamsters Local 174 v Lucas Flour Co*, 369 US 95 (1962).

⁵² It is not as though these types of employer-employee disagreements arise on every ship; therefore the costs of having an arbiter onboard will, on average, outweigh the benefits.

⁵³ See Fitzpatrick and Anderson, eds, *Seafarers' Rights* at 257, 259, 262 (cited in note 3).

⁵⁴ See *id* at 331, 333, 340–41.

⁵⁵ See *id* at 486.

⁵⁶ See *id* at 489.

strike are detrimental to the laborers' ability to enforce their rights under the Convention.

The lawful use of labor strikes aboard ships has proven to be quite effective in the past. In early 2007, the Russian crew of a cargo ship successfully forced the shipowner to release three months of unpaid salary to their families by striking while the ship was docked in the Iraqi port of Umm Qasr.⁵⁷ A similar situation was effectively resolved via seafarer strike in September of 2006, when a Filipino crew organized a work stoppage while in the Port of Long Beach to force its Greek shipowner to release over a quarter of a million dollars in unpaid wages.⁵⁸ These examples show that the seafarers' right to strike is a matter of great importance. It is troubling, then, that the Convention fails to address this matter altogether.

In order for seafarers to protect the rights granted to them under this Convention, it is crucial that they have the option to strike. Once isolated on a ship, labor is their only bargaining chip. Even if the international shipping community does not want to provide a broad right to strike, the matter should at least be addressed within the four corners of the Convention to clarify this area for shippers and seafarers around the world.⁵⁹

V. POTENTIAL NEGATIVE RESULTS OF RATIFICATION

While the potential positive results of ratification are clear, and the various deficiencies in the Convention have been outlined above, there are some additional dangers that may result from broad ratification of this agreement.

A. INCREASE IN COSTS OF SHIPPING

Many of the provisions in this Convention, such as the medical care and accommodations requirements, will make the shipping business much more costly for shipowners. Shippers and ultimately consumers will bear these costs. While this result would not be inherently negative, there could be adverse side

⁵⁷ *Russian Seafarer Strike Successful*, (Jan 16, 2007), available online at <<http://www.bridge-log.com/articles/russian-seafarer-strike-successful/>> (visited Nov 17, 2007).

⁵⁸ Dan Weikel, *Ship's Crew Ends Strike*, LA Times B4 (Sept 13, 2006).

⁵⁹ There are, of course, several reasons that the shipping industry may be wary of seafarer strikes. If, for example, the entire repair crew were to strike at a time when the ship's engine failed, the crew could be stranded at sea, jeopardizing the safety of everyone onboard. A possible compromise may be found in the national laws of Brazil, which permit seafarers to strike, but exempt workers that perform essential services from this privilege. Through such a framework, the majority of workers can protect their rights, while essential services such as food, health, and repair continue without disruption. See Fitzpatrick and Anderson, eds, *Seafarers' Rights* at 237–238 (cited in note 3).

effects. For example, less wealthy shipowners may have difficulty staying in business; to the extent that entire nations rely predominantly on less wealthy shipowners, this could adversely affect their ability to import and export goods. Further, less wealthy shippers may no longer be able to afford shipment of their goods to foreign markets, impacting their ability to remain in business. These costly requirements may also make it more difficult for new shipowners to enter the shipping industry, thereby reducing competition and driving prices even higher. Given that approximately 80 percent of world trade is shipped via ocean transportation, these consequences could prove significant.⁶⁰

B. DELAYING FURTHER REFORMS

The ILO has worked for five years to put together the Maritime Labour Convention, and it will likely be several more before it finally enters force. Because of all of the thought, hard work, and compromise that has gone into drafting this Convention, it is unlikely that further reforms of international seafarer rights will be pursued anytime soon. It is thus crucial that the ILO include all necessary reforms in this Convention to ensure that seafarers are provided with the rights and protections they deserve. As has been noted in other areas of international law, “reforms induced by foreign affairs pressures may be primarily symbolic in nature and thus actually delay or prevent meaningful reform.”⁶¹

When a deliberative body pushes for comprehensive reform, it typically does not revisit that area of law for quite some time. It is difficult to reach agreement on large reform packages; much compromise is necessary, and when a solution agreeable to the majority of decisionmakers is finally reached, there is a strong incentive not to “rock the boat.” If the topic is reopened for any reason, all of the tough compromises are inevitably rehashed, and areas of disagreement that were initially left out of the reform package are raised once again. For this reason, when a deliberative body reaches agreement on a comprehensive reform package, it is generally left as is for the foreseeable future. This inertia can perhaps be best understood in terms of transaction costs: because transaction costs are so high when a large deliberative body pursues a multifaceted reform package, the benefits that may come with reopening an agreed-upon package for additional reforms are infrequently greater than the transaction costs that would re-emerge. Examples of this can be seen regularly through the work of the

⁶⁰ See UN World Summit on Sustainable Development, *Press Conference on 'Flags of Convenience'* (cited in note 1) (“Some 80 percent of the world's trade involved shipping”).

⁶¹ Curtis A. Bradley, *Book Review: Foreign Affairs and Domestic Reform*, 87 Va L Rev 1475, 1477 (2001) (reviewing Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton 2000)).

United States Congress. The Help America Vote Act, for example, was a comprehensive voting reform package passed into law during the 107th Congress. The final text of the bill was agreed upon after much debate and compromise, particularly regarding identification requirements for voter registration.⁶² As the deadlines for state compliance with heightened standards on voting machines approached, it became clear that many states would have difficulty meeting those deadlines. Nevertheless, there was great reluctance among legislators to revisit the Help America Vote Act and amend those deadlines for fear of what may result if that legislation, which was reached through a highly delicate compromise, was reopened.⁶³

Seafarer unions around the world would be wise to pay careful attention to the provisions within this agreement, as well as those provisions that are conspicuously absent from it. Foreign affairs pressures to achieve something in the area of seafarer rights must not be permitted to result in an unenforceable, incomplete agreement that accomplishes little more than the prevention of true reform.

VI. CONCLUSION

The Maritime Labour Convention unquestionably represents a significant step forward for seafarer rights. At minimum, compiling the various agreements that compose the current legal framework will assist seafarers in understanding and enforcing their rights, and the ratification process will encourage nations to reaffirm their commitment to accepted standards in maritime trade. That the Convention has some value, however, does not mean that it should be accepted as is.

While it is certainly possible that the Maritime Labour Convention is fully functional as currently drafted, this Development has highlighted some concerns that may not be adequately addressed. The seafaring community would do well to give some further thought to these matters before pushing forward with this agreement. Those that have an interest in seafarer rights must not allow this Convention to be ratified until they are confident that it contains all of the provisions necessary to enable seafarers to safely and effectively perform their crucial duties. Otherwise, reluctance to reopen this delicate, multifaceted compromise could prevent further necessary reforms from happening for quite some time.

⁶² For a general discussion, see Gabrielle B. Ruda, *Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act*, 31 Fordham Urban L J 235 (2003).

⁶³ See R. Doug Lewis, *2004 Election Success and State Initiatives*, 78 Spectrum 5, 6 (2005).

